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In The

Supreme Court of the United States

October Term, 1984

THE DOW CHEMICAL CO.,

Petitioner,

v.

UNITED STATES OF AMERICA BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION AND CHAMBER OF COMMERCE OF THE UNITED STATES

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With the written consent of all parties, the Mountain States Legal Foundation (MSLF or Foundation) and the Chamber of Commerce of the United States (Chamber) respectfully submit this brief as amici curiae on behalf of their members. Amici have filed the consents of the parties with the Clerk of the Court.

INTEREST OF AMICI CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual

liberties, private property rights, and the free enterprise system. The Foundation seeks to protect the liberty and property rights of its individual and corporate members, including their rights of privacy in the protection of their commercial interests.

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the United States. Chamber membership exceeds 184,000 business firms and individuals, including more than 180,000 corporations, partnerships, and proprietorships, more than 3,900 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in the litigation of issues of national concern to the American business community.

The issue before this Court is whether the Environmental Protection Agency (EPA) violates the Fourth Amendment rights of the nation's manufacturing concerns when it conducts warrantless overflights of the open air but enclosed plant sites using special aerial cameras that expose manufacturing processes otherwise protected as trade secrets. The nature of the chemical manufacturing industry requires that key parts of the facility be unroofed for reasons of safety, cost, and practicality. It is essential to the financial success of Foundation and Chamber members' businesses that they be able to protect trade secrets and realize their expectations of privacy within the perimeter of their manufacturing plants. So long as overflights are warrantless, the companies have no way of knowing that photographs have been taken, and if so, whether the photographs require trade secret designation to prevent their dissemination.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit held that Dow Chemical Co. (Dow) has no privacy rights under the Fourth Amendment to prevent the taking of aerial photographs of the enclosed but open air parts of the Midland plant. The Court of Appeals reasoned that society did not recognize a right of privacy, since the interior parts of the plant could be seen from the air, like open fields. [Petitioner's Appendix A, p. A-9.]

The court's conclusion conflicts with long established expectations of privacy that protect valuable trade secrets from intrusion. If a competitor of Dow had done what EPA did, there is no question that Dow could have sued the competitor for violation of its valuable trade secrets.

The Sixth Circuit held that the curtilage doctrine did not apply to commercial areas, especially those so large as the areas occupied by Dow's outdoor manufacturing processes. [Petitioner's Appendix A, p. A-11.] This holding conflicts with decisions in the Courts of Appeals for the Seventh and Ninth Circuits. The Sixth Circuit also misapplies this Court's holding in *Oliver v. United States,* 104 S. Ct. 1735 (1984) by extending the open fields doctrine to open air manufacturing processes that are an integral part of the plant's structures. The court's decision also makes no sense. If the Fourth Amendment protects the buildings to which the integral manufacturing components are attached, it is illogical to deny the pipes, wires, and smoke stacks the same protection solely because they can be seen by special aerial cameras.

The application of the open fields doctrine to a fully enclosed and secured commercial plant threatens the long

standing privacy rights traditionally afforded to businesses.[1] So long as EPA's actions are deemed lawful, it is impossible for the chemical industry to effectively protect its trade secrets because a competitor can lawfully acquire this information from EPA under the Freedom of Information Act, 5 U.S.C. § 552 (1980), before it has been designated as a trade secret.

No public good is accomplished by expanding the open fields doctrine to the fully developed and secured but unroofed confines of a manufacturing plant. None of the photographs revealed violations of the Clean Air Act. The overflight was merely an effort to obtain information without probable cause. There is no justification for the continuation of these overflights on that basis.

EPA has advanced no convincing reason to justify its exemption from the rule that a warrant is required for an administrative search. Exceptions to the requirement of a warrant reflect the exigencies and practicalities of law enforcement. However, no such exigencies justify EPA's warrantless overflights of the Dow plant because Dow could not hide any violation of the Clean Air Act by shutting down its plant for a few days solely to avoid EPA photography.

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[1]This Court has unequivocally recognized that Fourth Amendment protection extends to commercial areas. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) (warrant is necessary for an administrative search of business premises); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (warrant is necessary for search under OSHA); and *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 348 (1977) (recognizing a civil claim against the IRS for violation of privacy rights in business premises).

ARGUMENT

Introduction

The Sixth Circuit's decision in *Dow Chemical Co. v. United States,* 749 F.2d 307 (6th Cir. 1984) has far reaching consequences for all manufacturing industries regulated by the EPA. By necessity, key protected processes used by these industries are located in the interior but unroofed parts of a plant. It is an accepted fact that, with the exception of specialty chemicals, most manufacturing plants must install critical aspects of their facilities out-of-doors. As a result, the Sixth Circuit's holding will affect petroleum refineries and petro-chemical manufacturers, as well as the chemical manufacturing industry, all of which locate key parts of their plants outside the buildings.

The law protects Dow's proprietary interest in these integral manufacturing components because, in the context of the entire plant, they are a blue print that shows how these chemical products are made.[2] The typical chemical plant covers hundreds to thousands of acres on which numerous buildings are located. *See generally* Peters and Timmerhaus, *Plant Design and Economics for*

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[2]This Court has held that a trade secret is a property right and its loss is compensable under the Fifth Amendment. In *Ruckelshaus v. Monsanto Co.,* 104 S.Ct. 2862, 2878 (1984), this Court explained the reasons for trade secret protection.

> Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. . . . Information that is public knowledge or that is generally known in an industry cannot be a trade secret. . . . If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished. (Citations omitted.)

Chemicals Engineers, McGraw Hill (3d ed. 1980). These buildings are interconnected by pipes, wires, and smoke stacks that are an integral part of the manufacturing process.[3]

Aerial photographs, like those taken of the Midland plant, reveal the shape of the buildings plus the location and type of products that are unloaded and stored. The apparently random configuration of the buildings, and the external structures tell the experienced chemical engineer not only the product that is manufactured, but how it is done. The damage is multiplied when these trade secrets are memorialized in detailed photographs that can be carefully studied. For this reason, the chemical manufacturing industry zealously guards against any breach of its security. *Dow Chemical Co. v. United States,* 536 F. Supp. 1355, 1364-65 (D. Mich. 1982). [Petitioner's Appendix B, pp. 1319-21.]

Dow's plant, like those of other manufacturers, is entirely fenced to prevent even casual observation. The companies employ round-the-clock security guards who restrict entrance to employees and authorized visitors. Sophisticated surveillance systems are also installed to monitor all activities inside the plant. As an additional precaution against industrial espionage, the security guards, as well as employees, are told to keep an eye out for suspicious looking aircraft overhead. Cf. *E. I. duPont deNemours & Co. v. Christopher,* 431 F.2d 1012 (5th Cir. 1970), *cert. denied,* 400 U.S. 1024 (1971), *reh'g. denied,* 401 U.S. 967.

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[3]The Sixth Circuit incorrectly treats the areas between the buildings as if they were unoccupied like an open field. *Dow Chemical Co. v. United States,* 749 F.2d 307, 313 (6th Cir.

(Continued on the next page)

I. EPA Should Not Be Exempted From Having To Obtain A Search Warrant For Overflights.

The Sixth Circuit's decision threatens the ability of America's manufacturing industries to protect their trade secrets from dissemination under the Freedom of Information Act. Moreover, no public policy is advanced by extending the open fields doctrine to outdoor manufacturing facilities.

EPA has never established any reason that it should not be required to obtain a warrant in these circumstances. Exceptions to the presumption of law that any search requires a warrant are built around the practicalities and exigencies of law enforcement.[4] The smoke stacks that were allegedly the focus of EPA surveillance are not contraband nor are they moveable. Dow could not evade environmental law enforcement by changing the building's structure or closing the plant, because it would cost thousands of dollars to do so. This case involves a type of administrative search that should never be conducted without a warrant.

The facts in the record substantiate the absence of any legitimate reason for EPA to engage in these warrantless aerial searches. Dow had cooperated with EPA on its first inspection of the plant. Dow objected to the request for

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1984) [Petitioner's Appendix, p. A-10]. The open air processes for which Dow seeks protection under the Fourth Amendment fully occupy the spaces between these buildings. These pipes, wires, and smoke stacks cover many acres and for reasons of safety, cost, and practicality, cannot be roofed to avoid aerial surveillance.

[4]This Court has upheld warrantless administrative searches in industries that have a history of pervasive regulation, like liquor and firearms. *Donovan v. Dewey*, 452 U.S. 594 (1980).

permission to take photographs because EPA gave no reason nor placed any limits on what it wanted to photograph. There were other means to obtain evidence that the Midland plant was not in compliance. This kind of investigation is neither authorized under the Clean Air Act nor supported by the Constitution.

The Sixth Circuit's conclusion that Section 114 of the Clean Air Act, 42 U.S.C. § 7414, impliedly authorizes warrantless aerial surveillance legislates by judicial decision the very authority that Congress declined to give the EPA.[5] Section 114 was the product of extensive Congressional debate and negotiation. The courts should not be permitted to imply powers of enforcement that Congress chose not to grant.

II. The Decision Below Conflicts In Principle With Decisions Of The Seventh And Ninth Circuits By Refusing To Apply Curtilage Protection To Commercial Areas.

The Sixth Circuit's conclusion that a business has no Fourth Amendment protection for its curtilage conflicts with decisions in the Seventh and Ninth Circuits. The portions of the Dow plant that the petitioner seeks to protect clearly fall within the common law notion of curtilage.[6] However, the Sixth Circuit stated that:

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[5]Section 114 provisions appear in virtually identical form in the Clean Water Act, 33 U.S.C. § 1318, the Resource Conservation and Recovery Act, 42 U.S.C. § 6927, and the Toxic Substances Control Act, 15 U.S.C. § 2610. Therefore, the Sixth Circuit's expansion of EPA's authority goes far beyond the facts of this case.

[6]The curtilage is the area adjacent to a structure that is protected by the Fourth Amendment, because its proximity and relationship to the structure also entitles it to protection. *Care v. United States*, 231 F.2d 22 (10th Cir. 1956).

> Dow's reasonable privacy interest in the interior of its buildings does not extend into the areas between the buildings because, unlike the home setting, there is no compelling reason in terms of privacy to justify this extension. After a diligent search we have found no cases applying the curtilage concept to the commercial setting. Although there may be some places for research and development or employee interaction which justify an extension of the concept, we hold that the common law curtilage doctrine does not apply to this particular manufacturing setting.

Dow Chemical Co., 749 F.2d at 313 [Petitioner's Appendix A, p. A-12].

In contrast to the Sixth Circuit, the Seventh and Ninth Circuits have applied the curtilage doctrine to commercial settings. In *United States v. Swart*, 679 F.2d 698 (7th Cir. 1982), the court rejected evidence of the registration numbers of cars parked in the lot of a closed repair shop because:

> First, *Katz* would preclude an absolute rule that anything beyond a specific distance from a dwelling or business is in an area unprotected by the Fourth Amendment. Second, in the instant case, there were sheds near the garage and the affidavit supporting the search warrant said the cars were in the area surrounding the sheds and garage. Therefore, the cars may have been within the curtilage of the business buildings.

Id. at 702. The curtilage doctrine also extended Fourth Amendment protection to fir trees stacked in an open lot behind a motel in *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968). *See also, United States v. FMC Corp.*, 428 F. Supp. 615 (W.D.N.Y. 1977) (recognizing right of privacy in fenced lagoon located on industrial plant site).

The integral manufacturing components adjacent to the Midland plant buildings are within the curtilage.[7] The outdoor manufacturing processes are connected to the buildings and are an integral part of the buildings' functions. As an extension of the buildings already protected by the Fourth Amendment, they are also entitled to Fourth Amendment protection.[8]

III. The Sixth Circuit's Decision Conflicts With Common Law Expectations Of Privacy Under The Fourth Amendment.

The extension of the open fields doctrine to a manufacturing plant distorts the public interest objectives of the open fields exception and is out of line with the law of the Fourth Amendment. Only last year in *Oliver v. United States,* 104 S.Ct. 1735 (1984), this Court affirmed the long standing rights of privacy in a business setting. "The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment." *Id.* at 1740, n. 8.

The open fields doctrine has generally been limited to just that—an open field. This Court recognized the limits of its holding in *Oliver* when it stated:

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[7]The Sixth Circuit conceded that Dow was entitled to Fourth Amendment protection of the interior of the buildings. *Dow Chemical Co.,* 749 F.2d at 312 [Petitioner's Appendix A, p. A-12].

[8]Ironically, the Sixth Circuit was troubled by the large area covered by the outdoor manufacturing components. However, expanse alone should not preclude the application of the curtilage doctrine. Indeed, as has been argued here, expanse is the main reason that Dow could not roof the sensitive portions of the plant.

> Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas. . . . the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable.

Id. at 1740.

The open fields doctrine is also limited to undeveloped and unoccupied areas. This Court wrote:

> It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, contrary to respondent Thornton's suggestion, Tr. of Oral Arg. 21-22, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment. (Citations omitted.)

Id. at 1741, n. 11.

The Sixth Circuit's application of the open field doctrine to a developed site goes far beyond its scope and, as a result, diminishes the recognized privacy rights of the manufacturing industry. The areas that Dow objects to being photographed were not open spaces as described by the Sixth Circuit. The ground was covered with pipes and wires. If the Midland plant is an open field, then there is little land in the nation that is not an open field.

IV. EPA Aerial Surveillance Conflicts With Expectations Of Privacy Recognized By The Fifth Circuit In E. I. duPont deNemours & Co. v. Christopher.

The Sixth Circuit's decision establishes a public policy that interferes with a business' right and ability to protect its trade secrets. The Sixth Circuit concluded that society did not recognize an expectation of privacy because Dow had failed to roof the expanse of land covered by the manufacturing components for which Dow claims trade secret protection.[9] This conclusion flies in the face of the common law that would recognize a right of privacy by according Dow a claim against any third party that might attempt to take photographs of the facility. As establisted in *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971), *reh'g. denied*, 401 U.S. 967, the fact that parts of the plant can be seen from the air does not make the surveillance any less unlawful. The court specifically held that:

> The question remaining is whether aerial photography of plant construction is an improper means of obtaining another's trade secret. We conclude that it is and that the Texas courts would so hold.
>
> One may use his competitor's secret process if he discovers the process by reverse engineering applied to the finished product; one may use a competitor's process if he discovers it by his own independent research;

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[9]The Sixth Circuit used the test enunciated in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) that defines the parameters of the Fourth Amendment as follows. "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

> but one may not avoid these labors by taking the process from the discoverer without his permission at a time when he is taking reasonable precautions to maintain its secrecy. To obtain knowledge of a process without spending the time and money to discover it independently is *improper* unless the holder voluntarily discloses it or fails to take reasonable precautions to ensure its secrecy.

Id. at 1015-16. (Emphasis in original.)[10]

Many other amici member companies have been subjected to EPA surveillance. Counsel for Allied Chemical Corporation reported that in 1980 he filed a request for aerial photographs under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1980). EPA responded by sending dozens of photographs of chemical plants, several of which depicted his own company's plants. Until Allied received the photos under FIA, the company had no inkling that EPA had conducted the overflights.[11]

EPA's cavalier attitude in the handling of photographs in the Dow case and the incident described above

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[10]This Court has disapproved the acquisition of trade secrets by aerial surveillance. "The law also protects the holder of a trade secret against disclosure or use when the knowledge is gained, not by the owner's volition, but by some 'improper means'. *Restatement of Torts*, § 757(a), which may include theft, wiretapping, or even aerial surveillance." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475-76 (1974).

[11]A company can ask for trade secret designation in order to limit further dissemination under FOIA. However, unless the company knows about the overflights and sees the photos, it has no way to insist on trade secret protection from EPA.

has been repeated with alarming frequency over the last five years. If the companies had some right to notice of overflight, such as being served with a warrant, then they could ask that EPA protect this information. Without the requirement of a warrant, these companies face the loss of their trade secrets without any recourse against EPA or a competitor.[12]

CONCLUSION

The Sixth Circuit's decision has far reaching implications for not only the chemical industry but for all industries subject to administrative inspections. For these reasons, the Mountain States Legal Foundation and the Chamber of Commerce of the United States respectfully request that this Court issue a writ of certiorari to the Court of Appeals for the Sixth Circuit.

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[12]The common law only protects a trade secret if it is obtained unlawfully or through unauthorized disclosure. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).